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In The

Supreme Court of the United States

October Term, 1971

No. 71-636

COMPANIA ANONIMA VENEZOLANA DE NAVEGACION (VENEZUELAN LINE),

Petitioner,

against

WESTINGHOUSE ELECTRIC INTERNATIONAL CO.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES FOR THE SECOND CIRCUIT

JOHN NIELSEN,
Counsel for Respondent,
10 Rockefeller Plaza,
New York, N. Y. 10020.
212—PL 7-8660

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Proceedings Below

Plaintiff brought an action against Venezuelan Line alleging he suffered personal injuries due to negligence and unseaworthiness of Venezuelan Line's vessel.

Venezuelan Line brought Westinghouse Electric International Co. and John W. McGrath Corporation (plaintiff's employer) into the action as third-party defendants and plaintiff joined Westinghouse as a defendant, alleging neg-

ligence and breach of an absolute duty to furnish a seaworthy vessel.

At the end of the evidence, plaintiff's cause of action for negligence was dismissed as against the Venezuelan Line and his cause of action against Westinghouse for breach of an absolute duty to furnish a seaworthy vessel was also dismissed. The case was submitted to the jury as to whether the vessel was unseaworthy and as to Westinghouse, whether it was negligent.

The jury found against Venezuelan Line, finding that its vessel was unseaworthy, and found that Westinghouse was not negligent.

The Trial Judge, to whom the issues on Venezuelan Line's third-party action were submitted, dismissed the cross-actions.

Venezuelan Line appealed to the Court of Appeals for the Second Circuit from the judgment against it in favor of plaintiff and dismissing its cross-actions. The Court of Appeals affirmed in all respects. Petitioner Venezuelan Line raises no issue on this petition with respect to the judgment in favor of plaintiff nor dismissing its third-party action against McGrath.

Questions Presented

Petitioner presents two questions:

(1) Whether the Second Circuit erred in holding petitioner entitled to indemnity from Westinghouse for failure to so package its goods that same could be used as a walking floor by longshoremen, and

(2) whether the Carriage of Goods by Seas Act, 46 U.S.C.A. 1300 et seq. applies to an action by a longshoreman for personal injuries.

Re: The First Question Presented

Petitioner implies that the Second Circuit's decision in the instant action is contrary to the holding in *Williams* v. *Ocean Transport Lines* (3d Cir), 425 Fed. 1183 and *Simpson Timber Co.* v. *Parks* (9th Cir.), 390 Fed.2d. 353, cert. den. 383 U.S. 858. There is no inconsistency.

In the instant action the jury has found that, even if this were a Westinghouse crate (and it was Westinghouse's position in both Courts below that the evidence did not permit such finding and Westinghouse does not abandon such position herein), Westinghouse did not negligently package its transformers. In this, the instant action differs from *Simpson Lumber Co.* v. *Parks, supra,* since in that case the jury found that the Lumber Company, the shipper, had negligently packaged a bundle of doors, whereby a piece of cardboard concealed an opening in each door and failed to warn of the danger, which negligence was the sole proximate cause of the accident (390 Fed. 2d., p. 355). Petitioner places reliance upon a footnote in the *Simpson Lumber Co.* case, (390 Fed. 2d, pp. 355-356) on other possible theories of liability, none of which theories was necessary to the case, or was supported by authority or had ever been applied.

Nor does *Williams* v. *Ocean Transport Lines* (3d. Cir.), 425 Fed. 2d 1183, apply since said case involved the liability of one who furnished a defective crane and conceded liability to the shipowner sued by an injured longshoreman. The statement of the Court on page 1187 is not germane to the holding in the *Williams* case and is not dispositive of the issue involved herein.

The Trial Judge found there was no evidence of any breach of an alleged warranty that the crates were not fit for the purpose intended, i.e., for overseas shipment of transformers, concluding that "Quite obviously the crates were for the purpose of preventing the transformers from

coming in contact with other cargo. They were patently not an ideal or deceptive flooring or deck" (7a).

The testimony is consistent with such a finding for the crate was fit for the intended purpose of preventing scratching or other damage to the finish on the transformer.

But the shipowner would require a shipper of goods to furnish a container for his product which would serve as a working surface by those engaged in loading or unloading the vessel upon which the container is shipped, thus substituting the shipper for the longshoreman's employer, the stevedore, and the shipowner as the ones required to furnish him with a safe place to work, which duty Judge Murphy, in dismissing plaintiff's second cause of action against Westinghouse properly held not to exist.

The rule is that a shipper must furnish a container which will hold his product so that it will not damage the products of others, as in cases of liquid shipped in a drum (*Eastern Motor Express Co.* v. *A. Maschmeyer, Jr.* (CA2), 247 Fed.2d 826, cert. den. 355 U.S. 959), or a bag which will prevent the beans contained therein from spilling upon the deck (*Gutierrez* v. *Waterman S.A. Corp.*, 376 U.S. 206).

In *Gutierrez,* the Court said (p. 213):

> "These cases all reveal a proper application of the seaworthiness doctrine, which is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used. See *Mitchell* v. *Traveler Racer, Inc.*, 362 U.S. 539, 550; *Morales* v. *City of Galveston,* 370 U.S. 169, 172 (dissenting opinion). A ship that leaks is unseaworthy; so is a cargo container that leaks."

But *Guiterrez* nowhere obligates a shipper, who furnishes a container suitable for its product, e.g., a drum that does not leak, to provide a container strong enough to withstand any use to which a cargo loader, be he a longshoreman or freight car loader, may desire to put it, including use of a crate as a working surface by a longshoreman weighing 230 lbs.

Westinghouse, so the jury and Trial Court have found, furnished a container fit for the purpose intended-one in which his product might be safely shipped.

No authority places a duty on a shipper to do more than enclose his product in a carton or container which is adequate to contain the product, particularly when it has left his hands and has come under the control, as here, of those who are experts in the shipping of goods, the vessel and the stevedore hired by it.

Re: Second Question Presented

The Second Circuit's application of the Carriage of Goods by Sea Act, 46 U.S.C.A. 1300 *et seq.*, more particularly Sec. 1304 (3), was not the sole basis for that Court's decision but an additional reason for its holding.

Counsel for Petitioner contends that said Act is limited in its application to damage to the shipper's cargo. No such limitation is found in said Act, nor do the authorities to which Petitioner refers so hold. It cannot, we submit, be held that no other hazard was within the zone of the Congress' comprehension (See: *De Haen* v. *Rockwood Sprinkler Co.*, 258 N.Y. 350, 354).

It would be anomalous to hold that where the shipper is not negligent in packaging his goods for shipment and can recover from the vessel owner damage to the goods, he is nonetheless liable to the shipowner for all other damages, such as damage to the goods of other shippers or injury to others, even where the vessel owner, the shipper not

being present, sanctions use by longshoremen of the shipper's containers or packages, as in the instant action, as a working platform—a purpose not intended by the shipper which adequately packaged its goods for shipment.

The authorities cited by Petitioner do not hold that the Act applies only to loss of or damage to the shipper's goods but merely hold that one provision of the Act, viz., the time limit within which an action might be brought against the vessel by the shipper, Section 1304 (5) applies only to damage to goods (*Atlantic Mut. Ins. Co.* v. *Posieda Scheffardt,* 206 F. Supp. 15, affd. 313 Fed. 2d 872, cert. den. 375 U.S. 819; *States S.S. Co.* v. *American Smelting & Refining Co.,* 339 Fed. 2d 66; *Toho Bussan Kaisha, Ltd.* v. *American Pres. Lines, Ltd.,* 155 F. Supp. 886, affd. 265 Fed. 2d 418).

Section 1304 (3) of the Act deals with the *shipper's* liability to the vessel, not the vessel's liability to the shipper and does not limit the type of loss or damage, as noted in *Serrano* v. *U. S. Lines,* 238 F. Supp. 383, 388.

> "Since any Shipper's warranty which exists, exists only as an incidental obligation of that relation, it follows that COGSA's abolition of such warranties is equally effective whether the damage resulting from the breach of the asserted warranty was damage to goods or damage to person."

Indemnity was denied the shipowner whose liability was based upon unseaworthiness and where, as here, the shipper was not negligent.

CONCLUSION

It is respectfully submitted, that the petition for writ of certiorari to the United States Court of Appeals should be denied.

Respectfully submitted,

JOHN NIELSEN,
Attorney for Respondent.